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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 35

LLOYD BARENBLATT,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

REPLY BRIEF FOR PETITIONER

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Reply to Respondent's Point I.B (pp. 34-38)

Petitioner argues (Br. 20-25) that the language of the legislative mandate to the House Committee on Un-American Activities (unchanged since its formulation in 1938) both on its face and as interpreted by the Committee for the last twenty years, and even since the *Watkins* decision (Br. 23, ft. nt. 9), is fatally vague and must be judicially considered in its entirety in determining its validity as authorization for compulsory process. Respondent, apparently in the light of *Watkins*, does not attempt to argue either that the Committee's charter is sufficiently definite on its face or that the Committee exercised its claimed power only in definite areas and thus sought to endow vague language with definite and defensible meaning. Respondent seems to concede tacitly the fatal vagueness of the language

considered on its face and also the Committee's use of the language as authority to investigate generally and not merely in definable areas. The respondent apparently retreats to the limited argument that whatever the invalidity of the authorizing resolution "as authority for an inquiry into *other* fields or subjects" (Br. 38, emphasis respondent's), it may be saved as authority to investigate Communism and Communist activities because the legislative history indicates that Communism was one subject which the House of Representatives had in mind when it granted and renewed the grant of authority to investigate "subversive and un-American propaganda."

Petitioner submits that the fatally vague language of the resolution cannot be rescued judicially in this manner by importing one definite meaning into its defectively general words, particularly where invasion of First Amendment areas is involved and where concededly Congress has acquiesced in use of the claimed authority in areas outside of the area now sought to be defined. It is for Congress, not for the courts, to give a definite mandate to the Committee if it wishes to do so in the light of the *Watkins* decision.

But even if, contrary to petitioner's primary contention, the resolution might be saved as partially valid, it cannot, as respondent contends, be held constitutionally definite if applied to authorize any investigation whatever relating to Communism. The investigation at issue in *Watkins*, which engendered this Court's recognition of the excessive breadth of the Committee's charter, had as much relation to Communism as the instant investigation. As the Court was there aware, if the Committee has power to investigate any subject on the mere basis that it has an actual or alleged connection with Communism, it can "radiate outward infinitely" (354 U. S. at 204) in the political area.

If the resolution is to be saved it must be done by finding the intention of the House in the language of the resolution, such as the language authorizing investigation of subversive and un-American propaganda which "attacks the principle of the form of government as guaranteed by our Constitution" (Resp. Br. 36). To this end respondent argues that un-American propaganda activities were meant to include propaganda designed to overthrow our Government by force and violence and activities of foreign governments to influence "American public opinion in such a manner that domestic and external affairs would be affected" (Br. 36). Possibly the Committee's charter might be construed as sufficiently definite if limited to these categories or areas of investigation narrowly construed. If so applied the Committee's power would not cover the all-inclusive authority in the field of political persuasion which is the chief menace to First Amendment rights.

But even if the resolution were so saved by such construction, it is clear that the beliefs, expressions of opinion, associations and intellectual influence of college and university professors, at which this investigation was directed, had no substantial relation—if any relation at all—to propaganda designed to overthrow the Government violently, or to activities of foreign governments attacking our constitutional form of government. Therefore, even assuming the possibility of the partial validity of the House resolution, its application to compel testimony in the instant investigation in the field of peaceful and political persuasion by private citizens is unconstitutionally broad and vague.

Reply to Respondent's Point II-B (pp. 45-53)

Respondent argues that although the resolution refers neither to Communism nor education the House intended to authorize an investigation of Communism and Communists in education because in the debates on appropriations for the Committee the subject of such an investigation was discussed (Br. 47-52). The respondent's argument implies that wholly apart from the language of authorization used in the resolution the House's acquiescence in, and financial support of, the Committee's investigative activities constitutes legislative authorization of such activities.

The petitioner submits that establishment of investigative authority in this manner, independently of the language of the resolution, cannot be judicially approved if confusion and disorder are to be avoided. The respondent's argument is in effect that House debate virtually takes the place of the language of the authorizing resolution. Surely one limit to this recourse to legislative history is that it cannot independently supply the intent of the House but can merely supply the intended meaning of the words used in the resolution. The petitioner contends that whatever intention of some House members the debates relied upon disclose, the House in the language used in the resolution failed to authorize an investigation of education with that clarity which should be required if the exercise of legislative power enters an area requiring a judicial determination of constitutionality.

Persuasive reasons exist to require the House to express with reasonable clarity an intention to exercise legislative power which may infringe constitutional rights of private persons. The members of Congress, as well as the judiciary, are sworn to uphold the Constitution and therefore it is appropriate procedurally to require reasonably clear lan-

guage disclosing a deliberate intention to exercise the questioned legislative authority. After all the House has had no difficulty referring either to Communism or education when its intention was to include such areas.

Finally, the language of the resolution should be clear enough to advise the persons summoned as witnesses of the Committee's authority to question them. Certainly the language of the instant resolution does not satisfy this test. Neither the public nor the courts should be required to speculate as to the extent of the authority the House intended to vest in the Committee pa icularly where the difficulty is easily avoided by the House, initially or by amendment, stating the extent of the authority granted. A judicial rule requiring reasonable clarity in the authorizing resolution in itself would go far towards limiting the controversy in this field of legislative investigation by giving the House the opportunity, as well as the obligation, to consider the extent of the authority it wished to grant and by giving the public and prospective witnesses a clearer view of the authority the House intends its committees to exercise.

Reply to Respondent's Point III (pp. 53-86)

1. *Petitioner's Refusal to Answer as to Communist Party Membership.*

Respondent argues initially (Br. 30-31, 53-55) that the petitioner's conviction may be upheld for refusal to answer whether he was (Count One) or had been (Count Two) a Communist Party member and that therefore, apart from refusal to answer the other questions involved, this case does not involve "questions as to one's beliefs or general associations or political thinking" (Br. 30). Petitioner submits that the correct application of the constitutional and judicial principles delimiting the scope of Congressional

investigations does not permit so simple and easy a solution.

Upon petitioner's refusal to answer the initial question the Committee did not pursue its inquiry into his opinions, associations and efforts at political persuasion in accordance with the purpose and pattern of the investigation as disclosed by the examination of the responsive witnesses who preceded petitioner. Nevertheless, the lawfulness of his refusal to answer the first two questions about Communist Party membership can be judged only in the light of the purpose and pattern of the investigation in combination with the basis for selecting him individually for interrogation in an investigation with such a purpose. The validity of a question cannot be judged out of context because any question by an investigating committee to a private citizen is unauthorized outside of the context of the authority for and purpose of the investigation.

It is an obvious invasion of privacy, and invalid on this score alone, for a committee to summon and question a witness without justification in terms of investigative purpose as well as individual factual basis showing a likelihood of securing information from him pertinent to that purpose.

Respondent's stress on petitioner's asserted membership in the Communist Party, as distinguished from the Haldane Club of the Party (Br. 53-54), is beside the point. In petitioner's view it is immaterial whether petitioner was alleged to be a member of the Communist Party as such, or of a Party unit known as the Haldane Club, whether he refused to answer as to one or the other. In petitioner's brief the focus on the question of membership in the Haldane Club of the Communist Party was because that question appeared most accurately to reflect whatever justification existed for questioning petitioner. The vital circumstances are that the purpose of the investigation was to examine the intellec-

tual influence of teachers who allegedly were or had been Communist Party members, and that the basis for summoning petitioner was his alleged membership in a Communist Party group engaged in discussing such topics as the relation of Marxism to the arts. Conceding in this argument that the Committee's summoning and questioning petitioner on the basis of the information it had about him was consistent with the purpose of its investigation, the issue is whether the restraints imposed on First Amendment rights by such an investigation with the instant purpose and scope were justified by a compelling legislative objective (Petr. Br. 50-60). The validity of all the questions asked petitioner must stand or fall on the basis of whether it was constitutional for the Committee to investigate the intellectual and peaceful persuasion type of Communist Party activity by college and university teachers and students.

2. *Federal Grants and Subsidies.*

The respondent then argues at some length (Br. 61-69) that although "education is a matter primarily of state and local concern" (Br. 62)[1] the Federal Government has acquired some indefinite power with regard to all institutions of higher learning by virtue of federal grants and subsidies to some of them or to some of their students.

We have already pointed out in our main brief that the investigation must be justified in the light of the Committee's purpose when it was undertaken, and that it was not directed at the matter of grants and subsidies (Petr. Br. pp. 56, 58). However, in view of respondent's emphasis on the view that the Federal Government has a concern with education which justifies Congressional investigation,

[1] See *Brown* v. *Board of Education*, 347 U. S. 483, 493; *Everson* v. *Board of Education*, 330 U. S. 1, 6-7; *Meyer* v. *Nebraska*, 262 U. S. 390, 402.

and doubtless regulation, of it, we shall address ourselves to this issue.

Education cannot be Federalized through Federal subsidies. This Court has already rejected the dangerous doctrine that the Federal Government can extend its power over matters of local concern through aid programs (see *Butler* v. *United States*, 297 U. S. 1, 68-71). And certainly the control which would most smack of a Federalized dictatorship would be Federal control over the matter at which this investigation was directed: the fitness of teachers in bona fide institutions of higher learning from the standpoint of their political ideology and their influence on the thinking of students.

While there has rarely been an issue as to an extension of Federal power through Federal grants, the applicable principle is clear as a correlative of the frequent holding that the Government cannot coerce the sacrifice of Constitutional rights through the grant of benefits (see Petr. Br. p. 57). That is, the Government cannot extend its control through the power of the purse; it can neither affirmatively assume power in a matter to which its Constitutional grant of powers do not extend nor override Constitutional limitations on its granted powers. Thus, no legislative power over colleges and universities can be predicated on the grant of subsidies, and by the same token, the power to investigate by compulsory process, which extends only as far as does legislative power, cannot be predicated on Federal grants or subsidies. To put it another way; the Government cannot exceed its Constitutional limits by virtue of its benefactions; it cannot salvage an investigation which otherwise constitutes an unconstitutional interference with First Amendment rights through reliance on its grants and subsidies.

Respondent particularly stresses the fact that the Federal Government utilizes educational institutions to advance

various Federal programs: that "the Federal Government has contracted widely for the use of research facilities of American colleges and universities" (Resp. Br. p. 66). Indicative of the Federal Government's lack of control over these institutions is the fact that the research projects can only be assigned to the colleges and universities that voluntarily accept them. Indeed, the university most prominently involved in the instant investigation, Harvard, has avoided grants for secret research for the very reason that it believed Government investigation, appraisal, and clearance of professors was detrimental to scholarship.[2] Now respon-

[2] See statement of McGeorge Bundy, dean of the faculty of arts and sciences of Harvard University, on March 15, 1955, before the Subcommittee on Reorganization of the Senate Committee on Government Operations, Hearings on S. J. Res. 21, 84th Cong., 1st Sess., pp. 470-471: "Except in time of all-out war, it has been the historic policy of Harvard University to emphasize the importance to the nation of open research in basic subjects; for this reason we avoid engagement in secret government research, and we do not accept responsibility for the administration of security clearances of any kind. Exceptions to this policy have been extremely rare; currently Harvard has no secret contracts, no procedure for security clearance. * * * This policy is intended to make it possible for Harvard to make the greatest possible contribution to the advancement of knowledge * * * a university * * * must be guided in all its decisions by a steady respect for scholarly excellence and total freedom of inquiry. * * * In the Government you must be careful about discretion, political judgment, subordination, and many other qualities. * * * In the University, on the other hand, we start from a burning concern for individual excellence * * * The moral standards of great scholarship are stern, but they include a deep regard for the right of a colleague to his own honest convictions and his own choice of action * * * if the university, as an institution, is to engage in secret work, someone is going to have to pick and choose among its members * * * if the Government does it, then a part of the university comes under the surveillance of officers whose standards and purposes are not the same as ours."

In response to an inquiry from the American Civil Liberties Union on present policy, Dean Bundy stated in a letter dated November 3, 1958: "I know of no change in the policy of Harvard University with respect to government contract work."

dent's position is that the Federal Government acquires through the grant program an overall power of investigation, surveillance and control of political thought and association of professors in colleges and universities, even as to those institutions that have refused the grants.

Even assuming arguendo that Federal Government grants could be a source of any Federal investigative power, it would certainly be true, in view of the principles we have discussed as to an extension of power by this means, that the power would be a narrow one, restricted to the operation of a particular or potential program. The subsidies could in no event give the Federal Government a general and indefinite and undefined power to probe into matters of essentially local concern, such as seems envisaged by respondent. Respondent has not indicated that the matter under investigation has any direct connection with any of the existing or potential Federal subsidy programs (and see Petr. Br. pp. 58-59).

Finally, respondent's argument as to grants and subsidies does not show that the instant investigation is constitutional, even if we were wholly to ignore the principle that an extension of Federal power cannot be predicated on grants and subsidies. We must come back to the fundamental test of the validity of this investigation (see Petr. Br. pp. 27-28, 55-56): has the Government shown that the matter under investigation has such a "substantial bearing" on an issue of compelling concern to Congress that the restraint the investigation imposes on First Amendment rights is justified? Our main brief has demonstrated the drastic restraints imposed on First Amendment rights by this investigation (Petr. Br. pp. 42-50); respondent on the other hand has not satisfied its burden of showing that the instant investigation of the beliefs and associations of professors in established institutions of higher learning—

institutions which were not selected from the standpoint of subsidies, research facilities, etc.—had any substantial connection with Federal grants, and no such connection is apparent.[3]. Thus, the investigation is equally unjustified and unconstitutional under the First Amendment whether viewed from the standpoint of its connection with Congressional concern with overthrow of the Government (see Petr. Br. pp. 52-56), or Federal grant and subsidy programs.

3. *Facts as to the Purpose of This Investigation.*

The respondent next argues (Br. pp. 69-81) that the Committee had a valid legislative purpose in questioning the petitioner. But the respondent's own account of the purpose of the investigation, except for an erroneous emphasis on government subsidized secret research in universities and security clearance, confirms the indisputable fact that its purpose and thrust was the examination of the viewpoints and efforts at intellectual and political persuasion of private citizens in the academic world—college and university professors; it was from the standpoint of its intellectual effect that the professors' alleged or actual Communist Party membership, so much stressed by respondent, was examined (see Petr. Br. pp. 30-37).[4] Respondent misconceives the record when it injects the idea that the investigation focused on Government subsidized secret research in the universities and security clearance (Resp. Br. pp. 69, 79). It is only necessary to consult the Hearings to see that re-

[3] As we noted in our main brief, even if it be assumed that the Government has some legitimate concern with the content of the teaching in these institutions, the instant investigation would nevertheless be unjustified and unconstitutional (Petr. Br. p. 58, n. 54).

[4] This fact emerges from respondent's Statement even though it is interlarded with quotations of general principles from Communist writers which had been read into the hearings by Committee counsel, and which had little or no connection with the testimony (see R. 90-91, Resp. Br. p. 10; R. 121-124, Resp. Br. pp. 13-14).

spondent's statements are erroneous. Petitioner, who was engaged in the study and teaching of psychology, and the great majority of the other witnesses, were not even connected with departments involved in such research. When a professor's field happened to be the physical sciences or mathematics, he was sometimes asked whether he had worked on research for the Government and about his clearance for such work. Without disrespect to the Committee, however, the only true description of the place of these queries in the investigation is that the Committee once in a while stumbled upon some question relating to security in the course of an investigation which had the avowed and dominant purpose of investigating belief and expression of opinion.

It is apparent in the Hearing references cited by respondent (Resp. Br. pp. 67-68) as well as in several other instances where the Committee happened upon the fact that witnesses worked on research for the Government (Hearings, pp. 136-142; 1015-1016, 1038), that the questions on this point were wholly by-the-way. It is no more correct to say that the investigation was focused on Government research projects than to say it was directed at the problem of Communists in the Counter-Intelligence Corps of the Army. In similar fashion to the questions on classified research, Committee counsel came upon the fact that a witness had worked in the Army Counter-Intelligence Corps and later referred to this bit of information as evidence of the desirability of witnesses giving testimony (see Hearings, pp. 5798-5799, 5832).

It is obvious, as respondent seems to recognize in its argument as to the focus of the Hearings, that the investigation must look for its justification to its intended and dominant purpose; that purpose cannot be eked out from the stray and incidental bits of information to which respondent al-

ludes. The investigation did not, as respondent attempts to indicate (Resp. Br. p. 81), merely "touch upon" the intellectual or ideological phase of the Party, nor was this merely "one aspect" of the Party that was under investigation (see Resp. Br. p. 77). The intellectual and peaceful persuasion phase was *the* aspect at which the investigation was directed; information as to alleged participation in this type of Communist Party activity was the basis on which petitioner and all other witnesses were called, and was the only justification for their being interrogated (Petr. Br. pp. 28-31, 38-42, and Hearings, *passim*).

4. *Restraints Imposed on Freedom of Expression by Instant Investigation.*

Finally respondent argues (Br. 81-86) that the constitutionally protected interest against forcible disclosure of political associations and views must be subordinated to the Committee's interest in Communist Party membership among university professors. But respondent gravely errs in indicating that the only expression inhibited by the instant investigation is expression by Communist Party members and that the expression affected is "at least in substantial part, unlawful and unprotected by the Constitution" (Br. 60, 83-84). Bluntly stated, respondent's view appears to be that the instant investigation would have no effect on expression and association except for that of Communist Party members and except for inhibiting people from joining the Communist Party. But this Court clearly recognized in *Watkins* and *Sweezy* that an investigation like the instant one casts a pervasive restraint over the expression of all controversial and non-conformist views; for all—at least all who are not frankly defiant—will tend to avoid suspicion by suppression (see Petr. Br. p. 43).

The meat of this investigation, as shown not only by the Hearings but the Committee Report on them, was the wit-

nesses' forced confession of their expressions of lawful political dissent; it was on such dissenting expressions that the Committee's disapproval and suspicion fell throughout the Hearings (Petr. Br. pp. 32-37). Thus, contrary to respondent's argument, the expression which bore the major impact of this investigation not only is entitled to the protection of the Constitution, but the First Amendment rights here restrained are, moreover, those "which we value most highly and which are essential to the workings of a free society" (*Speiser* v. *Randall*, 357 U. S. 513, 521; and see Petr. Br. 43-44). Indeed, in the *Speiser* case this Court was assiduous about protecting "speech which falls close to the line separating the lawful and unlawful" (357 U. S. at p. 526)—unlawful, that is, in the sense of being an incitement of overthrow of the Government. Here the expression which was mainly affected and suppressed by the investigation was in no sense even close to the line of incitement of violence.

It is unimportant whether the words "activity and conduct" are applied to the matter under investigation (see Resp. Br. p. 79). We would agree that even thinking is activity and conduct. What is important is that thinking and expressing opinion, speechmaking and writing on political views, associating for the purpose of exchanging or advocating viewpoints, attempting to persuade teachers or other organizations to support political positions—all the activities with which this investigation dealt and which would as a result of it be approached with caution and timidity—are under the protection of the First Amendment, and it is indeed that Amendment's primary function to protect them.

"Margin of Error"—In respondent's depreciation of the restraint cast on First Amendment rights by the Committee's interrogation of petitioner as to alleged Communist Party membership, the chief factor respondent ignored is

the "margin of error, representing error in fact finding" (*Speiser*, 357 U. S. at p. 525)—a margin of course wider in congressional investigations than other proceedings because rules of evidence are not there observed. "The margin of error in fact-finding"—or more precisely in this case, the margin of error in fact-looking—is the major reason why this investigation inhibits non-conformist expression generally, rather than only expression by Communist Party members as respondent indicates (Resp. Br. p. 60). For, to say that petitioner or any witness can be asked whether he is a member of the Communist Party necessarily means, in view of the "margin of error," that he can be asked this question though in fact he is not a member. Again, if peaceful expression of opinion and political persuasion can be investigated in the belief that it is Communist-connected or a "ramification" of the Communist Party, it necessarily follows that opinion or activity which is not *in fact* so connected can be investigated in an effort to determine whether or not it has such connection. In sum, if possible connection with the Communist Party in and of itself is sufficient justification for an investigation, without consideration of the field and particular subject-matter of investigation, this necessarily means that the whole area of non-conformist political belief and expression and all persons engaging in such expression are subject to investigation, and thus to suspicion and restraint.

And indeed this has been the result of the view that Communist connection—which necessarily means *possible* Communist connection—is justification for an investigation, even though the investigation lies in the area of political expression. This Court has noted that the Committee's "range of activity has covered all varieties of organizations, including the American Civil Liberties Union, the C. I. O., the National Catholic Welfare Conference * * * various publications from the magazine 'Time' to the 'Daily Worker'

* * * it has repeatedly inquired as to membership in the Communist party and in other organizations which it regards as communist controlled or affected."[5] Again, in its latest report the Committee casts suspicion on expressions of opinion favoring amelioration of the immigration law, in that they may be Communist-inspired.[6] Indeed anyone expressing such an opinion could be investigated if the basis on which respondent supports the instant investigation is accepted: if the possibility of Communist connection per se is justification for an investigation in the area of political persuasion.

Any layman, possessed merely of common sense, can perceive the potential margin of error that must and does exist in a Congressional investigation. This margin and lay awareness of it is the major reason why a Committee investigation in the field of political persuasion—even assuming it is intended to be directed at the activity only of Communist Party members—restrains all controversial expression.

Freedom in the Academic World—Not only did the investigation cast a restraint on non-conformist expression generally, but it tended to impose inhibitions in the academic world in particular. For while the Hearings dealt with belief, discussion, and political persuasion outside as well as within the academic situation (see Petr. Br. pp. 33-37), the Committee's concentration was on such activities by college and university professors. The Committee thus treated members of this profession as particularly subject

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[5] *Watkins*, 354 U. S. at p. 202, n. 40, quoting the dissent in *Josephson v. United States*, 165 F. 2d 82, 95 (C. A. 2, 1947).

[6] Annual Report of Committee on Un-American Activities for the Year 1957, House Report No. 1360, 85th Cong., 2d Sess., pp. 13-14.

to surveillance and attack for their views and activities on political, social, and economic issues, and thereby exerted pressure on those in academic positions in particular to avoid suspicion by avoiding non-conformist expression. Further, the Committee indicated as one of its specific purposes the elimination from the teaching profession of those it identified as intellectually subject to the Communist Party (Petr. Br. pp. 5-6). This Government interference with the right of universities to select their faculty members and with the correlative right of persons to obtain faculty appointments, is obviously an interference with freedom of expression. For, an essential aspect of an academic position is the opportunity to develop and express viewpoints and the aim of the Committee, in interfering in faculty selection, was to control the development of opinion in the universities (see Petr. Br. pp. 5-6, 47).

We are not here concerned with how the universities and their administrators should determine the qualifications of faculty members. We are considering only the question of the Federal Government's interference with their freedom to make such determinations and the effect of that interference on the First Amendment right of expression in the academic world, where its maintenance is of the highest importance (Petr. Br. p. 44).[7]

Distinguishable cases.—Decisions permitting adverse governmental action related to Communist Party member-

[7] We need not enter respondent's debate with *amicus*, the American Association of University Professors, as to the meaning of "academic freedom" (Resp. Br. pp. 82-85). For our purposes it is sufficient to say that it is at least the right of persons in academic positions to that freedom from Government control of belief and expression which is the right of all citizens. And while it is certainly appropriate to consider all the investigations that would be validated by upholding the instant one (Cf. Resp. Br. p. 84), we need look no further than the one here involved for a gross interference with academic freedom.

ship relied on by respondent (Br. 59) are distinguishable because the instant investigation was directed squarely at the area of belief and peaceful political persuasion. This situation is similar to that in the *Speiser* case in which this Court distinguished the cases recited by respondent pointing out that they had not involved measures directed at expression but at "some interest clearly within the sphere of governmental concern," and that "the method of achieving this end touched on protected rights * * * only tangentially. * * * Each case concerned a limited class of persons in or aspiring to public positions by virtue of which they could, if evilly motivated, create serious danger to the public safety" (357 U. S. at p. 527). Here, as in *Speiser*, the apprehended danger was a danger from expression. Here, as there, First Amendment rights were not merely incidentally involved, but the governmental measure—in this instance an investigation—was directed squarely at the area of belief and expression.

Respectfully submitted,

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